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No. 89-1629

In The

Supreme Court of the United States

October Term, 1990

SALVE REGINA COLLEGE,

Petitioner,

v.

SHARON L. RUSSELL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

1. Whether a party is entitled to *de novo* review of a federal district judge's determination of state law in a case in which federal jurisdiction is founded upon diversity of citizenship?

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 890 F.2d 484 and is reprinted in the Joint Appendix. The opinions of the district court denying petitioner's motions for a directed verdict are also reprinted in the Joint Appendix. Finally, the opinion of the district court granting summary judgment in favor of the petitioner on five of the eight counts of respondent's complaint is reported at 649 F. Supp. 391 and is reprinted in the Joint Appendix.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment 10 of the Constitution of the United States. Powers Reserved to States or People – "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

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28 U.S.C. § 1652. State Laws as Rules of Decision.

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."
(June 25, 1948, Ch. 646, § 1, 62 Stat. 944).

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28 U.S.C. § 1291. Final Decisions of District Court.

"The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in Sections 1292(c) and (d) and 1295 of this title."

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1989. A timely Motion for Rehearing with Suggestion for Rehearing *En Banc* was denied on January 16, 1990, and the petition for Writ of Certiorari was timely filed on April 16, 1990. The petition for Writ of Certiorari was granted, limited to question 1 presented by the petition, on June 28, 1990. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Salve Regina College ("Salve Regina" or the "College") is a catholic co-educational college of arts and sciences located in Newport, Rhode Island. Salve Regina has a department of nursing which awards a bachelor of science in nursing degree to successful graduates who, in the opinion of the faculty, have fulfilled the requirements of the degree.

2. Respondent, Sharon Russell, a citizen of Hartford, Connecticut, entered Salve Regina as a freshman in the fall of 1982. Toward the end of Russell's freshman year at Salve Regina, she sought admission to candidacy in the nursing department (F.C.J.A. 161a – 171a; PE16).[1]

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[1] References in the Statement of the Case are to the Joint Appendix ("J.A."), the Joint Appendix filed with the United States Court of Appeals for the First Circuit ("F.C.J.A."), Plaintiff's Exhibits ("PE"), and Defendant's Exhibits ("DE") in the record on appeal.

She began her nursing studies as a sophomore in the fall of 1983.

3. On her first day as a nursing student, Russell was advised of the nursing faculty's expectations of students (F.C.J.A. 535a-536a). At this time, Russell suffered from a serious addictive eating disorder resulting in her being extremely overweight. Russell was approximately 200 pounds overweight – a medical condition known as morbid obesity (F.C.J.A. 298a; 415a; 485a). Persons with morbid obesity are at significant medical risk because of their overweightness (F.C.J.A. 479a).

4. Upon beginning her nursing studies, Russell had a private meeting with her advisor at which time Russell's obesity was discussed. The advisor discussed some of the requirements of the program and the need for Russell to lose weight. The advisor told Russell she was concerned about Russell's obesity, both for Russell's personal health and its likely impact upon Russell's ability to perform as a professional nurse (F.C.J.A. 305a; 538a).

5. The first year (sophomore) nursing curriculum at Salve Regina consists primarily of academic courses – as contrasted to clinical training which forms a major part of the junior and senior year nursing curriculum. Russell performed satisfactorily in her purely academic work. Nevertheless, Russell's obesity started to interfere with her nursing training and performance as early as her sophomore year. For example, Russell was unable to complete a course in cardiopulmonary resuscitation offered at Salve Regina (F.C.J.A. 191a; 316a) after she fell on the training mannequin's head and required the instructor's

assistance to raise herself (PE29; F.C.J.A. 1205a). Thereafter, the College discovered that Russell had significantly understated her weight on a health data form it relied upon in making clinical training assignments. Confronted with the discrepancy, Russell promised the College's Clinical Agency Coordinator, the person in charge of assigning nursing students to clinical agencies, that she would lose weight before entering the clinical program (F.C.J.A. 316a, 723a). Russell also signed a form in which she agreed, among other things, to "accept the decision of the Clinical Agency Coordinator and Department Chairman as final as to whether or not [Russell] can function in the clinical area" (F.C.J.A. 196a-197a; PE26).

6. Salve Regina's junior year nursing curriculum included a four credit nursing theory course and a four credit clinical training experience. Unfortunately, instead of dieting as she had promised, Russell had gained weight before starting her clinical training (F.C.J.A. 321a). The College permitted Russell to begin clinical training but, as the year progressed, the senior of Russell's two clinical instructors concluded that Russell's obesity was interfering with her nursing practice and training (F.C.J.A. 471a). Initially, Russell could not fit into the scrub gowns provided by the hospital in which she was training (F.C.J.A. 322a), thus precluding Russell from obtaining experience in the operating room (F.C.J.A. 583a). More serious concerns arose later. In her instructor's judgment, Russell was not internalizing and integrating concepts regarding nutrition and obesity and applying these concepts to her assigned patients (F.C.J.A. 573a; 584a).

7. At the conclusion of the fall semester of Russell's junior year, Russell was given a final clinical evaluation by the senior instructor (PE37). In that evaluation, Russell received six unsatisfactory grades and was informed that her professional performance was unsatisfactory (F.C.J.A. 231a; 594a-595a). The deficiencies noted by the instructor were all, in some respect, caused by or related to the physical and psychological ramifications of Russell's morbid obesity.

8. Salve Regina's Department of Nursing maintained a strict policy that even a single unsatisfactory grade in clinical training would result in a failing grade in the entire clinical course, leading to dismissal from the nursing program (F.C.J.A. 651a). In this case, however, the faculty was ambivalent about summarily dismissing Russell because of the unusual circumstances causing her failure (F.C.J.A. 593a; 652a). Russell's clinical instructor discussed the grade and available options with the department chairperson and indicated that she was willing to give Russell a passing grade if Russell would commit to losing weight.[2]

9. On December 18, 1984, a meeting took place between Russell, the clinical instructor and the department chairperson wherein an agreement was reached under which Russell would be given a passing grade in

[2] Russell consistently maintained that her obesity had no physiological basis and was within her power to change (F.C.J.A. 362a). She also insisted that her obesity was not a handicap (F.C.J.A. 362a). In the view of the clinical instructor, Russell's weight loss would likely improve the behaviors which concerned her (F.C.J.A. 627a).

the clinical course she had completed – thus avoiding expulsion from the nursing program – conditioned upon Russell entering a treatment program (Weight Watchers), achieving a weight loss of two pounds per week, and reporting her progress to the Clinical Agency Coordinator on a weekly basis (F.C.J.A. 232a; 625a). A written contract was prepared which established the conditions for Russell's continuation in the nursing program. The agreement provided, in part:

> I understand that failure to meet any and all of these conditions will result in my voluntary and immediate withdrawal from the nursing program at Salve Regina College thus making me ineligible for Nursing 411.[3]

(PE38, F.C.J.A. 1237a).

10. Russell signed the written contract (F.C.J.A. 350a). Russell understood that if she could lose two pounds per week consistently, and otherwise meet the academic requirements, she would be allowed to continue in the program (F.C.J.A. 341a). Russell also understood that she had committed herself to withdraw voluntarily from the nursing program if she did not meet the contractual commitment (F.C.J.A. 708a).

11. In reliance upon Russell's contractual promises, Salve Regina allowed Russell to continue in the nursing

[3] The course referred to in the contract, Nursing 411, is the clinical training component required to be taken during the senior year and is a prerequisite for graduating from Salve Regina with a degree in nursing. Russell's eligibility for the theory portion of the senior year curriculum, Nursing 410, was not affected by the contract (F.C.J.A. 658a).

program on a probationary status (F.C.J.A. 647a; 729a). After entering into the contract, Russell began a weight treatment program and reported as required, but unfortunately she achieved only a fluctuating weight loss which did not average two pounds per week (F.C.J.A. 240a). After May 1985, Russell failed to report regularly as she promised and, regrettably, began to gain weight once again. In July 1985, Russell was advised that the department was disappointed in her progress and that Russell had not fulfilled the terms of the contract (F.C.J.A. 260a-261a). Russell was told that she probably would not be permitted to enroll in Nursing 411 (F.C.J.A. 761a).

12. Russell's entire net weight loss over the six month period of her contractual obligation to lose weight was only 10 pounds. Russell also had failed to report weekly to the Clinical Agency Coordinator as she had promised. As a result, Russell was informed on August 21, 1985, that she had not complied with the conditions for entering Nursing 411 and that her name was being removed from the list of students eligible to enroll for that course (F.C.J.A. 372a-373a).

13. Notwithstanding the department's action, Russell was still enrolled as a student at Salve Regina and could have qualified to graduate although Russell could not have graduated as a nurse within the normal four year time frame (F.C.J.A. 795a; 764a). To have graduated from Salve Regina as a nurse, Russell would have had to establish her eligibility for entering the senior year clinical training (Nursing 411), successfully complete the senior year clinical training, and complete the other requirements for the degree (F.C.J.A. 795a).

14. Instead of pursuing her available options, which included filing a grievance, seeking reinstatement to the nursing department, or changing majors (F.C.J.A. 661a), Russell transferred to St. Joseph's College in Connecticut (F.C.J.A. 267a). Russell had to repeat her junior year at St. Joseph's College (F.C.J.A. 268a) due to that institution's requirement that students earn at least 60 credits in residence before graduating with a nursing degree (F.C.J.A. 437a). One year after undergoing radical surgery which reduced her overweightness by 50%, Russell successfully completed her bachelor's degree in nursing at St. Joseph's (F.C.J.A. 156a).

15. This litigation was commenced by Russell in September, 1985 against Salve Regina and five individually named faculty members. The complaint alleged handicap discrimination in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the denial of due process and unconstitutional interference with Russell's liberty and property interests, negligent and intentional infliction of emotional distress, invasion of privacy, wrongful dismissal, violation of implied covenants of good faith and fair dealing, and breach of contract (J.A. 5-19).

16. On November 17, 1986, the district court entered summary judgment in favor of defendants with respect to all of the claims save those involving intentional infliction of emotional distress, invasion of privacy, and breach of contract (J.A. 28-64). Since all the claims based upon federal law were dismissed, federal jurisdiction over the remaining claims was premised solely upon the diversity of citizenship, 28 U.S.C. § 1332(a)(1).

17. Pursuant to the district court's pre-trial order, the parties filed a joint statement which included 40 separate stipulations of fact agreed to by the parties (J.A. 65-81).

18. At the close of respondent's case-in-chief, the district court directed a verdict in favor of all the individual defendants on all of the claims against them, and directed a verdict in favor of Salve Regina on the claims of intentional infliction of emotional distress and invasion of privacy (J.A. 82-89). The district court ruled, however, that there was a triable issue with respect to breach of contract. Although the district court rejected Russell's claims that the weight loss contract was procured by duress and lacked consideration, and held that that special agreement which established the conditions for Russell's eligibility in the nursing program must be viewed as part of the overall relationship between Russell and Salve Regina (J.A. 85-87), the district court nevertheless stated:

> The basic question is whether Salve Regina College was justified in dismissing this plaintiff after completion of three years, and not allowing her to enter her fourth year, and final year, of the nursing program, toward a degree (J.A. 86).

The district court continued:

> In short, I think there is a legitimate question for the jury to decide as to whether the dismissal of the plaintiff in August of 1985 by Mrs. Chapdelaine, was reasonable and justified in view of the whole contractual relationship between the college and this plaintiff. In other words, it creates an issue of substantial performance . . . . If the jury can say that the plaintiff substantially performed her contractual obligations to the college, then they can say she was wrongfully discharged, or dismissed from her course. If the jury on the other hand determines that there was really no substantial performance, viewing the overall picture, including her obligations under the side agreement, then the jury can determine that the college justifiably dismissed her from the program (J.A. 87-88).

19. At the close of all of the evidence, Salve Regina renewed its motion for a directed verdict on the grounds, *inter alia*, that the plaintiff had admitted – as evidenced by the stipulated facts – that she had not met – nor came close to meeting – the conditions established for her continuance in the nursing program and that, as a result, Salve Regina was entitled to judgment as a matter of law. The College also urged that the "substantial performance" test was not applicable under Rhode Island law, or the law of any other state, in the unique context of the college-student relationship (F.C.J.A. 814a-817a). The district judge, while acknowledging that the Rhode Island Supreme Court had to-date limited the application of the "substantial performance" test to construction contracts, and while agreeing that the doctrine of substantial performance should not apply generally in the academic context, nonetheless ruled that he believed that the Rhode Island Supreme Court would apply the doctrine in this case. No analysis or legal rationale for this prediction was given (J.A. 90-91). The court denied the motion for a directed verdict and sent the case to the jury (J.A. 92-108). The College seasonably objected to the charge (J.A. 109-110).

20. The jury returned a verdict finding the College liable in damages for breach of contract (J.A. 113). The

district court denied the College's post-trial motions for judgment notwithstanding the verdict, for a new trial, and/or remittitur (J.A. 117-118), after which the clerk entered judgment (J.A. 115-116).

21. The court of appeals affirmed without engaging in any meaningful review of the case. Acknowledging that Rhode Island law applied to all substantive aspects of the case, the court of appeals characterized the case as one of "first impression" and noted that the district court believed that the Rhode Island Supreme Court would apply the substantial performance standard to the contractual relationship between a student and a college. Based upon the First Circuit's rule of deferring to interpretations of state law made by federal judges sitting in that state, the court of appeals held that the district court's determination was not "reversible error" (J.A. 130). The court of appeals also rejected petitioner's other grounds for appeal, considering it "appropriate to accord the district court reasonable leeway" (J.A. 131).[4]

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[4] The appellate panel found the "unique" position of the College as educator "less compelling" as a result of purported findings of the jury that Russell was forced into voluntary withdrawal from the nursing program solely because she was obese and did so after admitting her to the program with full knowledge of her condition (J.A. 129). In truth, there were no such jury findings. The jury was not instructed in a way which would have permitted any such findings, and the record would not have supported such findings even if they had been made. Rather, the record established that the College entered into a special contract with Russell because of academic failure related to her obesity and addictive behavior, and that her withdrawal was forced because of Russell's failure to fulfill the requirements mutually established for her continuation in the program.

SUMMARY

This case presents to the Court an important and potentially far reaching issue involving fundamental questions of fairness and the allocation of power between the federal and state judiciaries. The district court below applied its own opinion as to how the Rhode Island Supreme Court would view the complex relationship between a student and a college. Through the simple expedient of characterizing the case as one of first impression, the district court created a novel and highly troubling rule of state law while ignoring relevant decisions of the Rhode Island Supreme Court, legal precedent from other states following a similar doctrinal approach as the Rhode Island Supreme Court, and the reasoned views of legal commentators. Although the district court dressed up its decision in the guise of a prediction of what the Rhode Island Supreme Court would likely hold if the case were before it, no rationale or legal analysis accompanied the prediction. Except for the district judge's subjective feelings and belief, this creation of law for Rhode Island was totally without foundation.

Although courts of appeals exist for the purpose of correcting error of law made by district courts, the United States Court of Appeals for the First Circuit compounded the district court's error as a result of the standard of review it applies to district court determinations of state law – the so-called "rule of deference." Under this standard, the First Circuit deferred to the district court's presumed expertise in the law of the State of Rhode Island and uncritically accepted the district judge's prediction of state law. Thus, despite Salve Regina's statutory if not constitutional right to at least one appeal, that

right became largely meaningless because, under the rule of deference, the district court's interpretation of state law – even if incorrect – was not viewed as reversible error.

Conflict among the circuits now exists on the propriety of the rule of deference. While the majority of circuits still follow the rule of deference, the Court of Appeals for the Ninth Circuit, sitting *en banc*, has rejected the rule of deference and replaced it with full independent *de novo* review of state law determinations by a district court. *In re McLinn*, 739 F.2d 1395 (9th Cir. 1984) (en banc). The Third Circuit has now followed the lead of that watershed case.

The rule of deference practiced by the First Circuit is, in fact, a dramatic departure from traditional appellate court practice and is based neither upon pronouncements by this Court nor the Federal Rules of Civil Procedure. The rule of deference lacks a solid justification; the rule's only stated rationale is the district court's "expertise" in determining state law. In fact, it is easily demonstrated that the circuit courts of appeals, due to their inherent institutional advantages, possess far greater "expertise" than district courts in deciding issues of law – federal or state.

Moreover, since this Court's holding in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), it has been clear that the constitution mandates the application of state rather than federal decisional law in diversity cases. Policies basic to this Court's decision in *Erie* mandate full *de novo* appellate review by courts of appeals of district judges' determinations of state law.

ARGUMENT

I. THE RULE OF DEFERENCE APPLIED BY THE COURT OF APPEALS IS UNSUPPORTED IN LAW AND LOGIC; FAIRNESS MANDATES DE NOVO REVIEW OF A DISTRICT JUDGE'S DETERMINATION OF STATE LAW.

A. The First Circuit's Rule of Deference and the Conflict Among the Circuits.

Since the advent of the constitutional doctrine established by *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), federal courts sitting by virtue of diversity jurisdiction have been required to apply state substantive law as pronounced by the forum state's courts and legislature. Furthermore, the Rules of Decision Act, 28 U.S.C. § 1652 (1982), requires all federal courts to apply state law in cases that do not arise under the Constitution, treaties or statutes of the United States. In instances where the state's highest court or legislature has specifically spoken on a state issue, the lower federal courts have had little difficulty finding and applying state law. A serious problem of ascertaining state law may arise, however, when neither the state's legislature nor its highest court has spoken on the question in issue. In those situations where state law is unclear, federal courts must attempt to predict how the state's highest court would rule if it were to face the state law issue. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967).[5]

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[5] In *Meredith v. Winter Haven*, 320 U.S. 228, 237-38 (1943), this Court ruled that parties were entitled to have an adjudication of questions of state law in diversity cases, although such a rule does not appear to be constitutionally or statutorily mandated.

When a party appeals a federal district court's interpretation of state law to a federal circuit court of appeals, most federal appellate courts traditionally have deferred to the district court's interpretation of that law. *See, e.g.*, 19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4507 at 106-07 (1982). This "rule of deference," so-called, continues to be the law in the First Circuit. Thus, applying what it characterized as the "customary appellate deference accorded to interpretations of state law made by federal judges of that state," the First Circuit Court of Appeals in the instant case did not engage in any meaningful review of the district court's prediction that the Rhode Island Supreme Court would rule that a student's substantial – although not full – performance in meeting the requirements for continuing or completing an academic program is sufficient.[6] The First Circuit

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[6] Despite exhaustive research, the College has found no other case in the academic or educational context in which the commercial contract doctrine of "substantial performance" has been applied. To the contrary, the only courts that appear to have considered the application of such a doctrine have rejected it. *Slaughter v. Brigham Young University*, 514 F.2d 622, 627 (10th Cir. 1975); *Clayton v. Trustees of Princeton University*, 608 F. Supp. 413, 435 (D.N.J. 1985). What is more, the doctrine of substantial performance is inherently unworkable in the academic context. Imagine, for example, a student who successfully completes 124 out of 128 credits required for graduation. Should a jury be permitted to conclude that the student "substantially performed" the requirements and, thus, is entitled to a degree? Would anyone wish to be treated by a nurse who "substantially performed," but did not fully meet the requirements for graduation? Professional education requires subjective evaluation in non-cognitive areas like clinical performance, and the law must respect a faculties' professional

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failed to analyze the district court's novel interpretation of Rhode Island law because it is "reluctant to interfere with a reasonable construction of state law made by a district judge, sitting in the state, who is familiar with that state's law and practices." *Dennis v. Rhode Island Hospital Trust Nat'l Bank*, 744 F.2d 893, 896 (1st Cir. 1984); *Rose v. Nashua Board of Education*, 679 F.2d 279, 281 (1st Cir. 1982); *Berrios Rivera v. British Ropes, Ltd.*, 575 F.2d 966, 970 (1st Cir. 1978); *New Hampshire Automobile Dealers Ass'n. v. General Motors Corp.*, 801 F.2d 528, 532 (1st Cir. 1986).

In support of its rule of deference, the First Circuit has cited Supreme Court authority as well as cases from other circuits.[7] Although the courts of appeals have used

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judgement as to the level of performance. *Cf. Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985); *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 78 (1978).

[7] The First Circuit has cited *Bishop v. Wood*, 426 U.S. 341 (1976), *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956), and *Runyon v. McCrary*, 427 U.S. 160, 180-82 (1976) as authority for applying its rule of deference. *See, New Hampshire Automobile Dealers Ass'n. v. General Motors Corp.*, 801 F.2d 528, 532 (1st Cir. 1986) (citing *Bishop*); *Berrios Rivera v. British Ropes, Ltd.*, 575 F.2d 966, 970 (1st Cir. 1978) (citing *Bernhardt*); *Graffals Gonzalez v. Garcia Santiago*, 550 F.2d 687, 688 (1st Cir. 1977) (per curiam) (citing *Runyon*). In the instant case, the First Circuit cited authority from the Second Circuit (*O'Rourke v. Eastern Air Lines, Inc.*, 730 F.2d 842, 847 (2d Cir. 1984). The First Circuit has previously relied upon authority from the Fifth, Sixth, Seventh and Tenth Circuits (*see Rose v. Nashua Board of Education*, 679 F.2d 279, 281 (1st Cir. 1982)) and the Fourth and Eighth Circuits (*Berrios Rivera v. British Ropes, Ltd.*, 575 F.2d 966, 970 (1st Cir. 1978)) in support of its rule of deference.

various terms to characterize the deferential standard of review[8], until 1984, all circuits applied deference to district court interpretations of state law.

In 1984, the United States Court of Appeals for the Ninth Circuit became the first circuit to reject the deferential standard by announcing, in an *en banc* decision, that anything less than "full independent *de novo* review" of state law determinations by the district courts amounts to an "abdication" of appellate responsibility. *In Re McLinn*, 739 F.2d 1395, 1398 (9th Cir. 1984) (en banc).[9] *In Re McLinn* was a wrongful death and personal injury suit arising from the collision of two skiffs in Alaska. The defendant skiff owners moved for summary judgment,

[8] In a comprehensive scholarly article, Professor Dan T. Coenen of the University of Georgia School of Law has prepared a circuit-by-circuit review of the rule of deference. *See, To Defer or Not to Defer: A Study of Federal Circuit Deference to District Court Rulings on State Law*, 73 Minnesota L.Rev. 899, 963-1017 (1989). According to Professor Coenen, most circuit court panels give "great weight," "substantial weight," "considerable weight," or "great" or "substantial" deference to district court rulings on state law. At least two circuits go further. The Tenth Circuit has held that such rulings carry "extraordinary force" and should stand unless they are "clearly erroneous" or "clearly wrong." The Sixth Circuit has stated that it will not reverse "if a federal district court has reached a permissible conclusion upon a question of local law." *Id.* at 902-903.

[9] The Third Circuit has now followed the Ninth Circuit's lead. In *Craig v. Lake Asbestos of Quebec Ltd.*, 843 F.2d 145, 148 (3d Cir. 1988), The Third Circuit cited *McLinn* with approval and held that district court determinations of state law are subject to plenary review.

raising an issue which depended upon the proper interpretation of an Alaska statute relating to liability of boat owners. The district court granted the motion for summary judgment and the plaintiff appealed. On appeal, a three judge panel determined that the outcome of the case depended upon whether the appellate court applied a deferential standard of review to the district court's determination of state law, or decided the state law issue *de novo* without any deference to the district court's opinion. The panel requested a rehearing *en banc* to determine the appropriate standard. In the *en banc* opinion, the Ninth Circuit acknowledged that appellate courts ordinarily had deferred to a district court's interpretation of state law unless that interpretation was clearly wrong. *Id.*, at 1398. This deferential rule stood in stark contrast to the exercise of independent plenary review of a federal district court's findings of federal law. The *McLinn* court reasoned that an appeal on an issue of state law should entitle the parties to the same *de novo* review that the federal appeals courts accord to issues of federal law.

In rejecting the rule of deference, the Ninth Circuit marshalled arguments of policy and authority against the rule in a well-crafted and thoughtful discussion.[10] The

[10] Most scholarly comment on *In Re McLinn* has supported rejection of the deferential standard of review in favor of *de novo* review. *See* Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 Minnesota L.Rev. 899 (1989); Comment, *What is the Proper Standard for Reviewing a District Court's Interpretation of State Substantive Law?*, 54 Cincinnati L.Rev. 230 (1985); Comment, *A Non-Deferential Standard for Appellate Review of State*

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Ninth Circuit reasoned in *McLinn* that numerous structural differences between the federal appellate courts and district courts demonstrate that *de novo* review is the only appropriate standard for reviewing district court determinations of law – regardless of the law's state or federal origins. First, appellate courts do not hear evidence and are therefore free to concentrate on legal issues. *Id.* at 1398. Second, circuit courts of appeals generally sit in three-judge panels in contrast to a single district court judge, thus reducing the risk of error. *Id.* at 1398. Third, precedential importance of federal appeals courts' opinions regarding state law confers a weighty responsibility to give *de novo* review to all legal decisions. *Id.* at 1401-02. And, finally, the *de novo* standard of appellate review permits the Supreme Court to conserve its resources for important questions of national scope. *Id.* at 1399-1401.

The Ninth Circuit noted in *McLinn* that appellate courts have given only one reason for applying a deferential standard of review – that a federal district judge is more likely than a federal appellate judge to have practiced law in the state and, thus, a district judge is generally more familiar with state law. *Id.* at 1400. Criticizing this traditional justification, however, the Ninth Circuit reasoned that a district judge should be able to articulate a basis for the judge's interpretation of state law by reference to legislative materials, commentaries on the law, and judicial opinions. *Id.* Moreover, the Ninth Circuit

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Law Decisions by Federal District Courts, 42 Washington and Lee L.Rev. 1311 (1985); *But see* Woods, *The Erie Enigma: Appellate Review of Conclusions of Law*, 26 Arizona L.Rev. 755 (1984).

noted that reliance on the district judge's experience transfers attention from the basis of the decision to the judge's biography and other personal characteristics not revealed by the record. *Id.* This tendency to place the judge's experience in issue is, according to the Ninth Circuit, both inefficient and improper. *Id.*

In support of its view that this Court has never required appellate courts to give deference to district court interpretations of state law, the Ninth Circuit cited *Butner v. United States*, 440 U.S. 48, 58 (1979), in which this Court declined to review the Fourth Circuit's interpretation of North Carolina law which was at odds with the North Carolina district court's original decision on the issue. The Ninth Circuit observed that implicit in this Court's decision not to review the state law question was the assumption that the Supreme Court need not exercise its discretionary jurisdiction because the appellate panel had exercised its mandatory appellate jurisdiction by giving full and independent review to the decision of the district court. 739 F.2d at 1399.

As the Ninth Circuit and subsequent scholarly research has demonstrated, the rule of deference practiced by the First Circuit and others is a dramatic departure from traditional appellate court practice and is based neither upon pronouncements by this Court nor the Federal Rules of Civil Procedure. Moreover, the rule's only stated rationale of district court "expertise" in determining state law fails to withstand careful scrutiny.

B. The Rule of Deference Lacks a Sound Rationale.

The right to at least one appeal is firmly rooted in our jurisprudence.[11] This thesis is at least statutory if not constitutional in origin. *Cf.* 28 U.S.C. § 1291; *Griffin v. Illinois*, 351 U.S. 12 (1956). Also well settled is the concept that the central task of an appellate court is to decide questions of law. *See Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 501 (1984); *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 855 n.15 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

When federal or foreign law issues are appealed to the circuit courts, they uniformly use a *de novo* standard of review. *See, e.g., United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 526 (1961). If, after identifying the controlling statute or principle of common law, the appeals court's conclusion differs from that of the trial court, the higher tribunal's opinion prevails. *See* W. Rehnquist, *The Supreme Court, How It Was, How It Is* 267 (1987). This rule of *de novo* review runs deep in our jurisprudential history. *See, e.g. Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 410 (1821); *Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 321, 329-30 (1796). The rule of deference applied by the First Circuit, however, clashes with this historic approach and

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[11] *See Standards Relating to Appellate Courts* § 3.10, commentary at 14 (1977); Hopkins, *The Role of an Intermediate Appellate Court*, 41 Brooklyn L.Rev. 459, 463 (1975); Hopkins, *The Winds of Change: New Styles in the Appellate Process*, 3 Hofstra L.Rev. 648, (1975); Rubin, *Views from the Lower Court*, 23 UCLA L.Rev. 448, 459 (1976).

produces results different from those that would be reached through traditional *de novo* review.[12]

The First Circuit's rule of deference is not mandated by this Court[13] or by the Federal Rules of Civil

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[12] *See* Coenen, *supra* note 8, at 902, n.16.

[13] The authorities cited by the First Circuit, including *Runyon v. McCrary*, 427 U.S. 160, 180-82 (1976), *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956), and *Bishop v. Wood*, 426 U.S. 341 (1976), do not support the rule of deference. In *Runyon*, for example, there was no disagreement between the district court and the court of appeals in the interpretation of a Virginia statute of limitations. The *Runyon* opinion makes clear that the Supreme Court did not defer to the initial conclusion by the trial judge, but rather accepted the "considered judgment" of the court of appeals. 427 U.S. at 180-82. In *Bernhardt*, this Court gave "special weight" to an interpretation of Vermont law made by a district judge, although the state law ruling was not considered by the court of appeals, which rested its decision on an alternative analysis. *See* 350 U.S. at 207 (Frankfurter, J., concurring). Importantly, this Court ruled in *Bernhardt* that because the Vermont law in question appeared clear, no reason existed to remand the case to the Second Circuit for review of the district court's decision. *Id.* at 205. This Court went on to observe, however, that "[w]ere the question in doubt or deserving further canvass, we would of course remand to the court of appeals to pass on this question of Vermont law." *Id.* at 205. Thus, *Bernhardt* does not support the rule of circuit court deference to district court rulings on state law. Rather, this Court's specific endorsement of remand to the circuit court to pass on state law issues whenever they are in doubt appears to cut against recognition of a general rule of circuit court deference. Finally, in *Bishop v. Wood*, while noting the state law experience of the federal district judge in this Court's decision to leave the holding below undisturbed, this Court also noted that the Fourth Circuit had concurred with the district judge. 426 U.S. at 345-46. In short, this Court has only deferred to

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Procedure.[14] Rather, the rule of deference is a creation of the courts of appeals based upon the view that federal district judges have more expertise in matters of state law than appellate judges. This view is simply wrong.

There is no reason to believe that district courts are generally more expert than the courts of appeals in deciding issues of state law.[15] While a district judge may have more familiarity with the law of the state in which he sits than the average court of appeals judge, institutional factors such as time constraints and the quality of trial advocacy call into question whether a district court is in a

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determinations made by three-judge appellate panels or district court rulings that have been affirmed on appeal, which is quite distinct from the 13 federal circuit courts deferring in thousands of state law cases, leaving unreviewed the findings of single district court judges.

[14] At least one circuit has cited Rule 52(a) of the Federal Rules of Civil Procedure, which provides that "findings of fact . . . shall not be set aside unless clearly erroneous," to support the use of a "clearly erroneous" or "clearly wrong" standard to define the degree of deference afforded state law rulings. *See, Carter v. City of Salina*, 773 F.2d 251, 254 (10th Cir. 1985). The "clearly erroneous" standard of Rule 52, however, is based upon the trial judge's unique opportunity to judge the accuracy of witnesses' recollections and make credibility determinations – factors that are not relevant to a conclusion of law – be it federal or state. Leading commentators have agreed that the "clearly erroneous" standard of review is not properly applied to state law rulings. 19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4507, at 109 ("determination of state law . . . is a legal question"); J. Moore, W. Taggart, A. Vestal & J. Wicker, *Moore's Federal Practice* ¶0.309[2], at 3128.

[15] *See* Coenen, *supra* note 8, at 920-937.

position to render a more expert decision on state law than an appellate panel. Certainly, in the 1990s, it is unreasonable to suggest that every federal district court judge possesses an expertise in a substantial portion of state law – encompassing a sufficient depth and breadth of understanding of legal issues – which outweighs the significant institutional advantages enjoyed by the courts of appeals in deciding pure issues of law. In contrast to courts of appeals, district judges necessarily must rule on important legal issues without benefit of extended reflection or extensive briefs and argument[16]. The trial judge, after all, is burdened with the conduct of the trial. Courts of appeals, on the other hand, have the luxury of focusing upon only a few issues of law, as well as the benefit of comprehensive written briefs by the parties and access to the full printed trial record, extensive library resources and research assistance. Moreover, the circuit courts have the institutional advantage of multi-judge panels in which each judge benefits from the others' insights, as well as the ability to question counsel at length

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[16] The facts of the case at bar well illustrate this point. Neither of the parties to this litigation raised the issue of applying the doctrine of substantial performance to the academic contract between Russell and the College. The issue was raised *sua sponte* by the district court when denying petitioner's motion for a directed verdict on the contract count. (*See* J.A. 88). Neither counsel nor the trial court had the luxury of time to conduct extensive research into the question during the trial. Such research was performed after the trial, and the results were presented to the Court of Appeals. Unfortunately, due to the application of the rule of deference, the results of the research were ignored by the Court of Appeals in deference to the findings of the district judge.

during oral argument. This deliberative process is specifically designed to increase the accuracy of decisions – the very purpose for having appeals in the first place.

Courts of appeals have other institutional advantages. They are by nature more insulated from political and personal pressures than district courts. Unlike district courts, deciding issues of law expertly is their primary role. They have far more time to research, reflect upon, and write about fewer legal issues than a district judge could ever hope to have. These institutional differences suggest that the courts of appeals possess far greater "expertise" than district courts in deciding state law issues. Or put another way, application of the rule of deference more often reduces the chance that litigants will obtain the most accurate interpretation of state law.

C. Negative Effects of the Rule of Deference.

In addition to lacking a solid justification, the rule of deference employed by the First Circuit creates serious problems which undermine the goals the appellate process is designed to achieve. The deference standard is vague and invites uncertain and uneven appellate review. The rule produces circuit court decisions that, as a practical matter, create state law precedent even though the holding of the appellate panel is not an independent construction of state law. *See In Re McLinn*, 739 F.2d 1395, 1402 n.3 (9th Cir. 1984). Moreover, the rule leaves the losing party with the distinct impression that they did not get a fair hearing on appeal. When a district court's decision involving a state law issue is affirmed simply

because it was issued by a district court judge, the aggrieved party is likely to view the system as a mockery of fair play, thus undermining an important purpose of appellate review – to defuse antagonism and hostilities by litigants by affording a fair hearing, both in fact and in appearance. The public's confidence in our judicial system is undermined by such a rule.

Finally, the belief that a district judge retains some special knowledge or expertise of state law which should be factored into a standard of appellate review is, in fact, a dangerous belief. This belief gives weight to an intangible factor – the experience or background of the judge – which factor is not in the record. If there truly are special details of state law that would have an effect upon how that state's highest court would rule upon an issue, there is no reason to believe that those details could not adequately be expressed and argued before a court of appeals, just as any other facet of the case would be.[17]

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[17] *See* Comment, *supra* note 10, 54 Cincinnati L.Rev. at 226; *see also* Kurland, *Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases*, 66 Yale L.J. 187, 217 (1957):

> [T]he very essence of the Erie doctrine is that a federal judge can find, if not make, the law as well as a state judge. Certainly, if the law is not a brooding omnipresence in the sky over the United States, neither is it a brooding omnipresence in the sky of Vermont, or New York or California. The bases of state law are assumed to be communicable by lawyers to judges, federal judges no less than state judges.

Id.

II. A DE NOVO REVIEW BY A CIRCUIT COURT OF APPEALS OF A FEDERAL DISTRICT JUDGE'S DETERMINATION OF STATE LAW IS MANDATED BY THE ERIE DOCTRINE.

The policies which are basic to this Court's decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), mandate full appellate review of a district court's determination of state law by a court of appeals. In *Erie*, this Court ruled that equal justice required, to the extent possible, application of the same law to all persons regardless of their citizenship, and neutralization of the advantage of forum shopping. 304 U.S. at 74-78. This Court announced in *Erie* that the constitution (presumably the Tenth Amendment) requires that federal courts, sitting in diversity jurisdiction, apply state "substantive" law. 304 U.S. at 78-80.[18] The *Erie* problem presented by the rule of deference is obvious. State appellate courts, such as the Rhode Island Supreme Court, do not afford special deference to trial court rulings on state law. *See, e.g., Fryzel v. Domestic Credit Corp.*, 120 R.I. 92, 98, 385 A.2d 663, 666 (1978); *Emerson Radio of New England, Inc. v. DeMambro*, 112 R.I. 300, 305, 308 A.2d 834, 838 (1973). State appellate

[18] While there has been much debate concerning the constitutional underpinnings of *Erie*, there seems to be no question that this Court considers Erie to state a rule of constitutional law. *See Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198, 202 (1956); *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965); Bowman, *The Unconstitutionality of the Rule of Swift v. Tyson*, 18 Bos. U.L.Rev. 659 (1938); Friendly, *In Praise of Erie – and of the New Federal Common Law*, 89 N.Y.U.L.Rev. 383, 384-398 (1964); Hart, *The Relations Between State and Federal Law*, 54 Columbia L.Rev. 489, 509-510 (1954); Hill, *The Erie Doctrine and the Constitution*, 53 N.W.U.L.Rev. 427, 541 (1958).

review proceeds *de novo*. Thus, but for the accident of respondent's domicile which allowed respondent to bring this case to a federal forum, this matter would have been tried before a Rhode Island trial court and the parties would have been accorded full appellate review by the Rhode Island Supreme Court – the state's highest judicial authority.

What happened, however, is that the First Circuit Court of Appeals, by applying the rule of deference and affording special weight to the trial court's state law conclusions, placed Salve Regina College in a decidedly different posture. By applying the rule of deference, Salve Regina College was not only foreclosed from a definitive ruling on state law, it was foreclosed from any meaningful judicial review of the district court's speculation as to state law. In essence, the federal district court alone was substituted for the entire state court system.

Since, as earlier demonstrated,[19] application of the rule of deference more often reduces the chance that litigants will obtain the best reading of state law, the rule clashes sharply with the guiding principle of Erie. State court litigants have a far greater chance that an appellate court will correct an error of law than do litigants who find themselves in federal court due to the accident of diversity of citizenship. Such unequal justice offends *Erie*. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

One of the chief aims of the *Erie* doctrine is to promote uniform development of substantive law in order to discourage forum shopping. In this context, the state-

[19] *See infra* 24-26.

created right of appellate review is clearly substantive under the interest-balancing approach long utilized by this Court in applying the Erie doctrine.[20] *See, e.g. Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 536-38 (1958). Application of the rule of deference unquestionably discriminates against appellants in the federal forum since the losing party will not have the ability to obtain *de novo* review. Moreover, because *de novo* review by a multi-judge court is part of Rhode Island's design for deciding appeals involving its citizens and its laws, application of the rule of deference by the First Circuit frustrates an important state interest. By the same token, deference frustrates the laudable goals of *Erie* because "[t]he essence of diversity jurisdiction is that a federal court enforces State law and State policy." *Angel v. Bullington*, 330 U.S. 183, 191 (1947). Thus, a rank discrimination against state law cases and litigants contravenes *Erie's* fundamental goal of safe-guarding "the proper distribution of judicial power between State and federal courts." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109-110 (1945).

The disadvantage due to the original choice of forum for the party seeking reversal, because they would have received a *de novo* review had the state court forum been chosen, may have an effect upon the party's choice of forum, thereby promoting forum shopping. *See, e.g.*,

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[20] The interest balancing approach for deciding whether to characterize legal rules as "substantive" or "procedural" focuses upon four considerations: equal administration of law; the state interest underlying the state rule; the federal interest, if any, in applying the federal rule; and the rule's effect on forum shopping. *See generally*, C. Wright, *The Law of Federal Courts* § 59, at 386 and n.55 (4th ed. 1983).

Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring). This is precisely what *Erie* was designed to guard against. To discourage forum shopping, litigants must face the same burden of convincing the court which interpretation of state law is the correct one regardless of whether they are in a state or federal forum. This constitutionally mandated goal cannot occur as long as the federal circuit courts use a different standard of review than used by state appellate courts. This Court can remedy this prohibited disparate treatment by compelling the courts of appeals to adopt the *de novo* review standard.

Other decisions of this Court mandate the use of *de novo* review by courts of appeals. In *Wichita Royalty Co. v. City Nat'l. Bank*, 306 U.S. 103 (1939), this Court held that a court of appeals in a diversity case is "substituted" for the state supreme court and must interpret state law as the state's high court "would have declared and applied it." *Id.* at 107. Thus, under *Wichita Royalty*, the First Circuit Court of Appeals should have applied the same *de novo* review as the Rhode Island Supreme Court would have applied.

Moreover, this Court has held that state law rules governing presumptions and burdens of proof control in federal diversity cases. *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943); *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208 (1939). Logically, presumptions and burdens of proof are substantive at the appellate level as well as trial level.[21]

Finally, this Court has instructed that "[t]he *Erie* rule is rooted in part in a realization that it would be unfair

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[21] *See* Coenen, *supra* note 8 at 954.

for the character or result of a litigation materially to differ because the suit had been brought in federal court." *Hanna v. Plumer*, 380 U.S. 460, 467 (1965). The deference accorded by the First Circuit in this case unquestionably changed the "character" if not the result of the appellate inquiry. Had this litigation proceeded in state court, Salve Regina College would have received a more rigorous appellate review than it received in the First Circuit. This discrimination occurred only because of the "fortuitous circumstance of residence out of a state." *Guaranty Trust Co. v. York*, 326 U.S. 99, 112 (1945).

CONCLUSION

The special deference granted by the First Circuit Court of Appeals to district court rulings on matters of state law is ill-conceived. It lacks a sound rationale and conflicts with the traditional functions and role of appellate courts. Moreover, the rule of deference produces second-rate appellate review of state law rulings in federal courts in a way which offends the *Erie* doctrine.

This Court should rule that every party is entitled to a full, considered, and impartial review of a decision of a district court. There is no justification for being less thorough, for abdicating any portion of a circuit court's appellate responsibility, or for curtailing a party's appellate rights simply because the law involved is state law. Litigants are entitled to careful, independent consideration of issues of law by the circuit courts of appeals regardless of the federal or state origins of the law in question.

For the reasons stated, this Court should reverse the judgment of the United States Court of Appeals for the First Circuit and remand for an independent *de novo* review of the issues of state law raised by petitioner. Alternatively, this Court should reverse and certify the question of the applicability of the commercial contract doctrine of substantial performance to the academic relationship between a student and a college to the Rhode Island Supreme Court for resolution. Through this alternative, the court best equipped to answer the state law question could do so in a definitive manner, and the equality of treatment which the *Erie* doctrine was aimed to accomplish would be assured.[22]

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[22] Rule 6 of the Rules of the Supreme Court of the State of Rhode Island authorizes that tribunal to answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or a United States District Court, when requested by the certifying court if there are involved in any proceedings before it questions of Rhode Island law which may be determinative of the cause then pending in the certifying court, and as to which it appears to the certifying court there is no controlling precedent.